
(1995) 03 AHC CK 0018
In the Allahabad High Court
Case No : Second Appeal No. 1824 of 1983

Ram Sewak

APPELLANT

Vs

Subhash Chandra Misra

RESPONDENT

Date of Decision : 21-03-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 10(2), Order 41 Rule 22(1), Order 41 Rule 22(4)
Evidence Act, 1872 — Section 115

Citation : AIR 1996 All 257

Hon'ble Judges : R.B. Mehrotra, J

Bench : Single Bench

Advocate : Mr. Suresh Chandra Verma, K.K. Mehrotra, for the Appellant; Mr. Harihar Prasad, I.N. Singh/Ajai Yadav, for the Respondent

Judgement

1. The present civil appeal has been filed by the defendant appellant.
2. The essential facts for adjudication of this appeal are as under.

Subhash Chandra Misra plaintiff filed Civil Suit No. 483/79 against Ram Sewak defendant before Munsif Kannauj and in that suit prayed for the relief that the defendant be directed to file the Stamp for (partition for his specific share in case No. 25/73 decided on 17-9-1973 before Sub-Divisional Officer Kannauj, and get his name recorded over his share in revenue papers under the supervision of the Court and execute the sale deed in favour of plaintiff; register the same, failing which the Court should get the sale deed executed through its agency and in case it is not deemed proper to get sale executed order for refund of Rs. 3000/- from defendant as earnest money and Rs. 1000/- as damages from defendant to plaintiff.

3. The defendant contested the suit.

The trial Court framed issues on the pleadings of the parties out of which reference to the following issues is appropriate for decision in this appeal.

Issue No. 1 : Whether on 1-5-1975 the defendant agreed to sell the disputed agricultural land to the plaintiff for a consideration of Rs.4000/- and the plaintiff paid Rs. 3400/-to the defendant.

Issue No. 2. Whether the defendant executed the agreement dated 1-5-1975 in favour of the plaintiff.

Issue No. 3. Whether the defendant had any right to sell disputed agricultural land if not, its effect.

Issue No. 4. Whether Sri Krishna Kumar and Brij Nandan Kumar have purchased the disputed agricultural land from the plaintiff and they are Bhumidhar thereof, if so its effect.

Issue No. 5. Whether the agreement dated 1-5.-1975 has been obtained from the defendant by practicing, fraud as alleged in para 11 of the written statement.

Issue No. 6. Whether the defendant has got a Quarra (Share specific) by a partition suit. If yes, its effect,

4. The trial Court deciding issue Nos. 1, 2, 5 together recorded a finding of fact on the evaluation of the evidence of parties that the defendant had executed the agreement dated 1-5-1975 and the contention of the defendant that the agreement has got written by practicing fraud is totally false and unworthy of belief and all the three issues were decided in favour of the plaintiff.

5. While considering issue No. 4, the finding of fact was recorded that the version of the defendant is not correct that he had sold the property in suit to Krishna Kumar and Brij Nandan prior to the agreement however, merely on the basis of the entry of names of Pratap Narain son of Laxmi Narain, Krishna Kumar and Brij Nandan in between years 1386-1388 Fasli the conclusion was arrived at that the defendant had no share in the disputed property.

6. Regarding issue No. 6 the finding recorded was that there being no final judgment of the suit on record, it cannot be decided that the share of defendant in the Quarra form had been finally granted or not. Accordingly in view of the above conclusion was the suit of plaintiff was decreed merely for refund of Rs. 3000/- and 1000/- as damages, however, the suit of plaintiff was dismissed for specific performance. Aggrieved by the aforesaid judgment the defendant filed the Civil Appeal No. 100/81 in the Court of Civil Judge Farrukhabad and the plaintiff filed cross objection in that appeal. The defendant appeal was dismissed under Order 41, Rule 10(2) by the lower appellate Court on account of not depositing the necessary security and the cross objection of the plaintiff respondent was admitted by order dated 18-2-1983. The lower appellate Court did not accept the finding of the trial Court that the defendant had no share in the property, on the other hand gave a finding that it is established from the evidence available on record that the defendant is the owner of the disputed property and it is the responsibility of the defendant that he should file stamp and get his name mutated in revenue records and accordingly directed that the

defendant should carry out the specific performance of the agreement of sale in favour of the plaintiff and on that footing allowing the appeal (Cross-objection) decreed the plaintiffs suit for specific performance and set aside the order of trial Court. Aggrieved by that order the defendant appellant filed the present appeal.

7. I have heard Sri. S.K. Mehrotra, the learned counsel for the appellant at length.

8. The learned counsel for the appellant has raised three points in support of the appeal.

1. That in the event of the dismissal of the appeal of defendant under Order 41, Rule 10(2) the cross objection of the plaintiff under Order 41, Rule 22(4) could not be decided on merits.

2. Defendant had already sold the property in dispute in favour of Sri Krishana Kumar and Brij Nandan Kumar on 16-3-1973 and in respect of that land the defendant had no right to execute an agreement of sale, the plaintiff has not made parties to those persons therefore under the circumstances the lower appellate Court has committed patent error of law in decreeing the suit for specific performance and in this very context contended that since the defendant had already sold the property, so he had no right to execute agreement in favour of plaintiff and the direction of specific performance of said agreement is against law.

9. I have considered the arguments advanced by the learned counsel for appellant. With all seriousness on the first point the learned counsel for the appellant cited the following decisions.

10. Fateh Kunwar Vs. Durbijai Singh, has laid the ratio in the said decision that the cross objection is not an independent appeal but is a proceeding connected with the appeal and if ultimately it reveals that the appeal was not filed in accordance with law or necessary Court-fee has not been paid in the appeal then under these circumstances the cross objection will automatically stand dismissed and the cross objection cannot be considered however, it was made clear that the said principle will not apply in withdrawal of appeal or will not be attracted in case of, its dismissal of appeal on other ground. The relevant portion of the Full Bench is extracted as under.

"37. The fact that in the High Court there is an appeal by one party and cross objection by another is immaterial, that the variation is in the appeal or in the cross objection. A cross objection is not wholly independent of an appeal. It is a part of the same proceeding. If it turns out that the appeal was not validly presented or was not duly stamped, the cross objection falls to the ground and cannot be considered, though the case of dismissal of an appeal by withdrawal of otherwise is different. This was the view taken in the Full Bench decision of this Court in Nathu Lal Vs. Raghubir Singh and that of the late Chief Court of Oudh in Abdur Samad v. Mt. Ais's Bibi AIR 1948 Oudh 76 (FB)

11. In the above judgment the fact in issue was as under what circumstances permission to appeal to Supreme Court can be granted in respect of the impugned judgment and in that connection, the aforesaid judgment was referred to, virtually the full Bench has not expressed any final opinion on this point even otherwise on reading the said para it is clear that if the appeal is withdrawn or otherwise dismissed on other ground, in that circumstance the principle will not apply that the cross objection filed by the defendant will get dismissed with the dismissal of appeal.

12. Pathumma Beevi and Others Vs. Rajakrishna Menon and Another, . In the said judgment it has been laid down that in appeal the cross objection can be only filed on concerned point in respect of which the petitioner is concerned. The cross objection preferred on a point not connected with the appellant's not liable to be admitted. The said judgment has no relevance in the present appeal.

13. Chanchalgaauri Ramanlal and Others Vs. Narendrakumar Chandulal and Others, . In the aforesaid judgment the Division Bench of Gujarat High Court laid down that if appeal has been filed by such person who is not a party to the suit, then that appeal is not maintainable and the cross objection preferred in that appeal is also not maintainable. That judgment is also not relevant for the instant appeal.

14. In Ram Chand Vs. Smt. Ramku and Others, Hon''ble Chief Justice Sri R.S. Pathak (as he then was) held that if the appeal itself is not maintainable Then the cross objection filed in that appeal has necessarily to be dismissed.

15. C.P. Mehra Vs. Sm. K.K. Mehra, single Judge of this Court held that if any appeal is dismissed for non-payment of necessary Court-fee then the cross objection filed in that appeal will not be maintainable.

16. In the present case the plaintiff had filed regular appeal and the said appeal had been filed within limitation and was maintainable according to law and necessary Court-fee had been paid, the appeal has not been held to be non-maintainable under any circumstance. On the other hand the lower appellate Court has admitted the appeal by order dated 23-4-1981 and the defendant was directed to appear on 10-7-1981 in appeal and also there was direction of lower appellate Court, to summon the file and from the order dated 8-7-1981 of lower appellate Court it is clear that the appeal was directed to be heard on 17-9-1987 and thereafter from the appellant side repeatedly applications were made that he should be given time to deposit the decretal amount the lower Court repeatedly gave time to deposit the decretal amount and even after the expiry of the said period, the decretal amount was not deposited in the Court below (lower appellate Court), consequently the appeal of defendant appellant was dismissed under Order 41, Rule 10(2). The decisions referred by the learned counsel for the appellant do not apply to the circumstances of this appeal, rather the exceptions carved out in the Full Bench case Fateh Kunwar Vs. Durbijai Singh, , are attracted in the present case.

17. Order 41, Rules 22(1) and 22(4) is being extracted as under.

(22) Upon hearing respondent may object, to decree as if he had preferred separate appeal. (1) Any respondent though he may not have appealed from any part of decree, may not only support the decree but may also State that the finding against him in the Court below in respect of any issue ought to Have been made in his favour and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the service on him or his pleader of the notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

2. Explanation -- A respondent aggrieved by a finding of the court in the judgment on which decree appealed against is based may under this rule, file cross objection in respect of the decree it so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree is, wholly or in part in favour of that respondent.

4. Where in any case any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn, or is dismissed for default, the objection so filed may never the less be heard and determined after such notice to the other parties as the Court thinks fit. Order 41, Rule 22(4) provision makes it clear that if the appeal is withdrawn or the appeal is dismissed for default, then under that circumstance the cross objection only on this footing will not be dismissed that the appeal has been dismissed. The provision of the said rule applies only on those circumstances under which the appeals not maintainable from the very beginning or is time barred.

18. It is clear from the provision of O.41, R. 22(4) that if appeal is withdrawn or same is dismissed in default, in that circumstance the cross objection will not automatically get rejected on the ground that appeal has been dismissed. The provision of aforesaid rule will be attracted only in those cases where appeal is incompetent since its inception or is barred by time.

19. The above decision also point out these two situations, that the cross objection will not be considered in two circumstances, either the appeal was not maintainable since its inception, or was barred by time. In the event of withdrawal of appeal or any other ground, the cross objection require to be decided on merits. The nature of the appeal dismissed under O.41, R. 10(2) is like the appeal dismissed for default AIR 1919 Pat 219(1), B. Mowar Shiobux Singh v. Mowar Thakur Dayal Singh.

20. I am clearly of the view that under the circumstances of the present appeal the cross-objection of the plaintiff respondent was not liable to be rejected on the ground that the defendant/appellants appeal had been rejected under Order 41, Rule 10(2) of Civil Procedure Code. The Lower Appellate Court by deciding the cross objection under the provisions of Order 41, Rule 22(1) of C.P.C. On

merits, has not committed any error of law.

21. Appellant's learned counsel's first point is rejected. The second point that has been raised by the learned counsellor the appellant is such that the same has been rejected by both the lower court on the basis of evidence. The trial Court has also recorded finding that the defendant has failed to establish that he had executed any sale deed in favour of Krishna Kumar and Brij Nandan. The trial Court merely on the footing that on the disputed property, the defendant's name is not entered, in the relevant Khatan came to the conclusion that the land did not lie in the share of defendant. The Lower Appellate Court has after considering all the aspects of the case and after discussion of the document upset that view and recorded the finding that the defendant has 1/4 share in the disputed property, and on that footing decreed the plaintiff's suit for specific performance,

22. I do not find any justification to interfere with the above finding of fact,

23. The second point can also be considered from another angle. It is the undisputed fact that the defendant executed an agreement regarding the disputed property in favour of plaintiff, and in that agreement it was clearly mentioned that the defendant is the owner of the disputed land. On believing the version of the defendant, the plaintiff according to the agreement gave Rs. 300/- as earnest money to the defendant. As per S. 115 of Evidence Act on the strength of estoppel by agreement, the defendant is estopped from contending that he is not the owner of the land in suit and from that point of view also the second point raised by defendant/ appellant's counsel does not deserve to be accepted.

24. Analysing all the circumstance I am satisfied that the Lower Appellate Court has recorded findings of fact based on evidence, the same are on in consonance with law and I do not find any justification to interfere with the same.

25. Accordingly the appeal is dismissed. On account of the absence of the respondents counsel, the parties will bear their own cost.

26. Appeal dismissed.